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U.S. Department of Homeland Security

Citizenship and Immigration Services

ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 Mass, 3/F
425 I Street, N.W.
Washington, DC 20536

[redacted]

File: [redacted] Office: VERMONT SERVICE CENTER Date: APR 21 2004

IN RE: Petitioner:
Beneficiary: [redacted]

Petition: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER: [redacted]

INSTRUCTIONS:
This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of Citizenship and Immigration Services (CIS) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of $110 as required under 8 C.F.R. § 103.7.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, revoked approval of the preference visa petition that is now before the Administrative Appeals Office on appeal. The appeal will be sustained.

The petitioner is a commercial cleaning company. It seeks to employ the beneficiary permanently in the United States as a cleaning supervisor. As required by statute, a Form ETA 750 Application for Alien Employment Certification approved by the Department of Labor accompanied the petition. The Form ETA 750 states that, if the petition is approved, the petitioner will employ the beneficiary for 40 hours per week and compensate the beneficiary at the prevailing wage of $10.79 per hour. The director revoked approval of the petition because he determined that the petitioner was not employing the beneficiary in accordance with the terms of the approved Form ETA 750.

On appeal, counsel submits a brief and additional evidence.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

Initially, the Service Center found the evidence the petitioner submitted sufficient to warrant approval of the petition. The Service Center approved the petition on February 9, 1999.

The record contains a letter, dated May 1, 2001, from the petitioner's human resources manager, submitted in a connection with the beneficiary's Form I-485 Application for Permanent Resident Status. The letter states that the petitioner had employed the beneficiary since December 27, 2000 and that he was then employed as a part-time supervisor. The letter states that the petitioner was compensating the beneficiary at the prevailing wage but does not specify the amount of that hourly wage.

Subsequently, apparently in response to an inquiry by CIS, the petitioner's human resources manager submitted a letter dated October 2, 2001. The letter confirms that the petitioner had employed the beneficiary since December 27, 2000, and was then employing the beneficiary as a part-time supervisor at $7 per hour. That letter continued that the petitioner intended to make the beneficiary a full-time supervisor within six to nine months.

On December 5, 2001, CIS sent the petitioner a Notice of Intent to Revoke approval of the petition. The notice stated that the evidence indicates that the petitioner apparently has not

employed and would not employ the petitioner full-time in accordance with the provisions of the approved Form ETA 750. The petitioner was accorded 30 days to respond to that notice. The record does not contain any response from the petitioner. On May 15, 2002, the director revoked approval of the petition.

On appeal, counsel states that the petitioner did timely respond to the Notice of Intent to Revoke. Counsel provides a copy of a letter, dated December 12, 2001, from the petitioner's human resources manager, which counsel states was submitted in response to the Notice of Intent to Revoke. The letter states that the petitioner made the beneficiary a full-time employee beginning on December 1, 2001. The letter further states that the petitioner always intended to hire the beneficiary full-time "at least by the time he received his permanent residency card."

Subsequently, counsel submitted another letter, dated January 24, 2003, from the petitioner's new human resources manager. That letter confirms that the petitioner has employed the beneficiary as a full-time cleaning supervisor since December 2001.

With that letter, counsel submitted an earnings statement for the pay period ending September 30, 2002. The statement indicates that the petitioner was then paying the beneficiary $8.50 per hour.

The petitioner is obliged, under the terms of the approved labor certification, to employ the beneficiary 40 hours per week and pay him $10.79 per hour, as was stipulated on the Form ETA 750. The remaining inquiry is when that obligation ripens.

Although 20 C.F.R. § 656.20(c)(2) states that the petitioner must pay the proffered wage when the beneficiary starts work, the Department of Labor's Technical Assistance Guide No. 656 at page 34 explains that the obligation is ineffective until the alien is adjusted to permanent resident status under section 245 of the Act. As the beneficiary in this case had not yet been adjusted to permanent resident status, the employer was not obliged to pay the proffered wage.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Having overcome the sole reason for revocation in this matter, the petitioner has met that burden and is entitled to have the visa approval reinstated.

ORDER: The appeal is sustained. The petition is approved.